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EX PARTE

February 6, 2003

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: Ex Parte Presentation, CC Docket Nos. 01-338, 96-98, 98-147, *In the Matters of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*

Dear Ms. Dortch:

Attached is an *Ex Parte* served today on Mr. Michael K. Powell, Chairman, Federal Communications Commission. In the attached *Ex Parte*, Qwest responds to an *Ex Parte* dated February 3, 2003, filed by AT&T, ASCENT, Broadview Networks, CompTel, Eschelon Telecom, MetTel. PACE Coalition, Talk America, WorldCom and Z-Tel Communications, Inc. regarding Qwest's January 30, 2003 Proposal for transitioning unbundled switching from the list of unbundled network elements required pursuant to section 251.

In accordance with Commission Rule 47 C.F.R. §1.49(f), this *Ex Parte* is being filed electronically via the Commission's Electronic Comment Filing System for inclusion in the public record of the above-referenced proceedings pursuant to Commission Rule 47 C.F.R. §1.1206(b)(1).

/s/ Cronan O'Connell

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February 6, 2003

Honorable Michael K. Powell
Chairman
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Re: Ex Parte Presentation, CC Docket Nos. 01-338, 96-98, 98-147, *In the Matters of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*

On January 30, 2003, Qwest proposed an innovative framework for transitioning unbundled switching from the list of unbundled network elements ("UNEs") required pursuant to section 251.[1] In particular, Qwest's proposal includes a substantial role for the states in determining when and how the unbundled switching requirement should be eliminated. This letter responds to the recent filing by AT&T, WorldCom and other proponents of UNE-P criticizing Qwest's proposal and seeking to perpetuate non-facilities-based entry at TELRIC rates.[2] Rather than address the merits of Qwest's proposal, the UNE-P proponents for the most part merely repeat their litany of unfounded arguments against removing switching from the UNE list, which have already been refuted by evidence on the record in this proceeding. In short, nothing in the UNE-P proponents' letter undermines the merits of Qwest's proposal.

As set forth in Qwest's January 30 letter, Qwest's proposal assumes that the Federal Communications Commission ("Commission" or "FCC") will conclude, as it must, that competitive local exchange carriers ("CLECs") are not impaired without access to unbundled switching. Against this backdrop, the proposal provides that state commissions would share responsibility with this Commission in establishing the *transition* for the elimination of the unbundled switching requirement. For those LATAs where at least three CLECs have deployed

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[1] Letter from R. Steven Davis, Qwest, to Michael K. Powell, Chairman, FCC, attached to letter from Cronan O'Connell, Qwest, to Marlene Dortch, Secretary, FCC (Jan. 30, 2003) ("Qwest Proposal").

[2] Letter from AT&T, Ascent, Broadview Networks, CompTel, Eschelon Telecom, MetTel, PACE Coalition, TALK America, WorldCom, Z-Tel Communications, Inc. to Michael K. Powell, Chairman, FCC (Feb. 3, 2003) ("UNE-P Ex Parte").

their own local exchange voice switches,[3] the Commission would eliminate the unbundled switching requirement for new orders 30 days after the incumbent local exchange carrier ("ILEC") files a declaration certifying the presence of three "qualifying" CLEC switches. The transition for customers already served via UNE-P in those LATAs would be directed by the state commissions, and would be completed within one year. For LATAs with fewer than three "qualifying" switches, the state commission would establish a transition period of up to two years for elimination of the unbundled switching requirement for new and existing customers in the LATA. State commissions would have significant responsibilities in all LATAs in two additional respects as well: (1) monitoring the hot cut process for the transition from UNE-P to UNE-Loops; and (2) developing procedures for and overseeing the transition of customers currently served by UNE-P to various other services.

The UNE-P proponents focus their attack on the underlying premise of Qwest's proposal, faulting Qwest for "ignor[ing] the fundamental problems impairing carriers' ability to compete effectively without unbundled switching[.]"[4] The impairment allegations raised by the UNE-P proponents simply miss the point of Qwest's proposal, as we show below, and, in any event, their arguments have already been thoroughly addressed in this docket.[5] Indeed, the "economic and operational barriers" to competing without unbundled switching cited by the UNE-P proponents are the same issues that AT&T and WorldCom have raised in numerous filings. And as the record overwhelmingly shows, these economic and operational issues do not indicate that CLECs are impaired without access to the incumbents' unbundled switching. To the contrary, marketplace evidence shows that competitive switching is widely available across the country. For example, 19 CLECs have deployed their own switches in the Denver LATA, 24 have deployed switches in the Seattle LATA, and four have switches in the South Dakota LATA. Such switches are frequently used to serve locations spread throughout even the largest LATAs.[6] The fact that WorldCom and AT&T may have chosen up until now to serve mass market customers via UNE-P, rather than their own facilities,[7] proves nothing. As the D.C. Circuit acknowledged in *USTA*, the availability of access to "virtually all network elements" may well have created a "disincentive effect" for carriers such as WorldCom to invest in their own

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[3] Qwest's proposal would count only the first CLEC switch in each LATA as a "qualifying" switch, and would ignore the presence of remote switches deployed by CLECs to transport traffic to a host switch outside the LATA, all switches of the independent telephone companies, and switches deployed by cable and wireless providers in (or that cover) the LATA. Qwest Proposal at 2.

[4] UNE-P Ex Parte at 1.

[5] *See* Qwest Proposal at 1 n.1.

[6] Qwest Proposal at 2 n.3.

[7] UNE-P Ex Parte at 2.

facilities.[8] The elimination of UNE-P would restore proper incentives for CLECs to use the switches that they have already widely deployed to serve mass market customers.

With regard to alleged "economic" barriers, the UNE-P proponents rely on WorldCom's flawed argument that CLECs would be impaired without access to unbundled switching if their costs would exceed those of the ILECs. As both the Supreme Court and D.C. Circuit have found, cost differences alone do not constitute competitive impairment.[9] WorldCom's argument also improperly equates ILEC costs with TELRIC prices for UNE-P, rather than examining whether, under current retail rates, facilities-based entry would provide positive margins for CLECs.[10] In fact, SBC has shown that CLECs can earn a positive margin in wire centers with more than 5,000 access lines.[11] For wire centers with fewer than 5,000 lines, the use of enhanced extended loop combinations ("EELs") may enable a CLEC to serve some of these wire centers on a profitable basis, by avoiding the need for collocation at each wire center.[12] To the extent CLEC entry in the smaller wire centers may be unprofitable, it is primarily due to below-cost

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8 *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (2002).

9 *See id.* at 426-28. *See also* Letter from Howard A. Shelanski to William F. Maher, FCC, at 3 (Jan. 14, 2003), attached to Letter from James C. Smith, SBC, to Michael Powell, Chairman, FCC (Jan. 14, 2003).

10 *Id.*

11 Letter from James C. Smith, SBC, to Michael Powell, Chairman, FCC (Jan. 14, 2003) ("SBC Ex Parte"). AT&T subsequently indicated that its "numerical cost impairment figures compare closely" with the data submitted by SBC, though AT&T, like WorldCom, wrongly compares CLEC costs to UNE-P costs. Letter from Joan Marsh, AT&T, to Marlene Dortch, Secretary, FCC, at 2 (Jan. 17, 2003). SBC's conclusions are further buttressed by marketplace evidence, including in Qwest's region. In almost 80% of Qwest's wire centers with 5,000 or more lines, at least one CLEC has ported a telephone number to its own switch, "and thus already ha[s] incurred many of the costs needed for facilities-based residential service in those wire centers." *See* SBC Ex Parte at 2.

12 The UNE-P proponents' suggestion (at 5) that Qwest "does not enable a competitor to combine multiple unbundled analog loops with transport" is wrong. Qwest, as well as other ILECs, offer EELs with multiplexing functionality. *See* Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services and Resale of Telecommunication Services by Qwest Corporation in the State of Colorado, Eighth Revision, ¶ 9.23.3.7.2.12.4 (Apr. 26, 2002). By using this functionality to digitize, concentrate and multiplex the signals on voice grade loops, a CLEC can avoid an upfront cost for collocation or concentration equipment. If the CLEC obtains sufficient market share to use concentration equipment, it can do so through virtual collocation in a Qwest central office. Qwest has committed to provide combinations of interoffice transport, concentration capability and DS0 Loops. *See id.* ¶¶ 9.23.3.7.2.12.5, 9.23.3.7.2.12.7, 9.23.3.8.4, 9.23.3.9.5.

residential retail rates in many rural areas.[13] In such areas, the D.C. Circuit found, "there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have been the object of Congress's concern."[14] In other words, any impairment faced by the CLECs in these areas would be due, not to the lack of access to particular UNEs, but rather to the lack of potential revenues for serving those areas. And, under Qwest's proposal, to the extent such areas are located within LATAs with fewer than three unique CLEC switches, the state commissions would have the responsibility to determine the appropriate transition mechanism based on the relevant local circumstances.

The operational "impediments" alleged by the UNE-P proponents are equally unpersuasive. The ILECs' hot cut performance to date has been superior, and their hot cut processes can be scaled to meet anticipated demand.[15] Moreover, Qwest's proposal speaks to the very concern the UNE-P proponents voice: under Qwest's proposal, state commissions would monitor the incumbents' hot cut practices, as established by the state commissions in the first place, to ensure that they are adequate to handle UNE-P orders, based on bona fide CLEC forecasts. Further, the UNE-P proponents' argument[16] that it would not be cost effective to serve an entire LATA with a single switch conflicts with marketplace evidence. In Qwest's region, some CLECs have chosen to deploy a single switch or a host/remote configuration to serve locations hundreds of miles apart.[17] Finally, Qwest is not aware of any operational issues regarding unbundled digital loop carrier ("DLC") loops. When Qwest provisions an unbundled loop to a CLEC for a customer that is served by a DLC, Qwest will move the customer to spare copper if it is available. Where spare copper is not available, however, Qwest has provisioned unbundled loops without moving the end user from the DLC architecture.[18]

The remaining criticisms of Qwest's proposal are unfounded, and misapprehend the proposal entirely. Qwest's proposed three-switch per LATA test is *not* intended to be a definitive measure of competition in a LATA and a means of determining whether the "no-

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[13] More than two-thirds of the Qwest wire centers with less than 5,000 lines are in zones 3, 4, or 5. In 9 of the 14 states served by Qwest, the UNE-P rate for zone 3 exceeds Qwest's residential local exchange rate. In zone 3 in Colorado, for example, the cost of UNE-P is $39.33, but Qwest's residential local exchange rate is $20.92 (including the subscriber line charge).

[14] *USTA*, 290 F.3d at 422.

[15] *See, e.g.*, Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, Secretary, FCC at 4 (Nov. 14, 2002) ("Nov. 14 Ex Parte") (noting Qwest's hot cut performance); Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, Secretary, FCC at 9 (Jan. 17, 2003) (showing that Qwest's service centers are scalable to meet anticipated UNE-L demand).

[16] UNE-P Ex Parte at 5.

[17] Qwest Proposal at 2 n.3.

[18] Nov. 14 Ex Parte at 24.

impairment" test is satisfied. As noted above, Qwest assumes that the Commission will recognize that unbundled switching does not meet the impairment test in *any* LATA. Rather, Qwest's three-switch per LATA test is intended to be a conservative, easily administrable means of identifying areas where the state commission may believe that local conditions warrant a longer transition. In contrast, evidence that at least three CLECs have each deployed one or more switches in a LATA indicates conclusively that little if any transition is necessary or appropriate for CLECs to serve new customers. In such markets, the evidence would illustrate not only that CLECs *can* obtain their own switching functionality, but that they already have begun to do so -- in other words, that the transition to independent switching has in essence already begun, and can continue apace. There is no question that, as a technical matter, such switching can be used to serve both business and residential customers, even though some carriers may have made the business decision to use their switches to serve only particular types of customers. As discussed above, such a business decision provides no basis for a finding of impairment in the absence of unbundled switching.

Nor is there any merit to the suggestion that Qwest's proposal would count non-operational switches. Under Qwest's proposal, ILECs would use standard industry databases, such as Telcordia's Business Integrated Routing/Rating Database System ("BIRRDS") and Local Exchange Routing Guide ("LERG") to identify CLEC switches in a LATA. These systems are used throughout the industry to route and rate calls among switches on the Public Switched Telephone Network ("PSTN"). Moreover, the switch data in these systems is input by the carriers themselves or their agents. There would be no reason for a CLEC to input a switch into the database, indicating that it expects other carriers to route traffic to it at that switch, if the switch were not in fact operational. The fact that a switch record and associated routing information for that switch exist in the LERG implies that the switch is operational and the service provider wants to send or receive traffic on the PSTN. Each carrier has substantial incentives to ensure the accuracy of its switch data, in order to guarantee proper routing of traffic destined for its customers. And of course, if for some reason a CLEC believes that the switch data submitted by an ILEC to the Commission is inaccurate, it would have the ability to inform the Commission. Finally, the suggestion that Qwest's proposal fails to deal with the possibility that switches might later be withdrawn from the market (or *become* non-operational) is equally wide of the mark. As noted above, Qwest's test is designed simply to identify those markets that have already engendered investment in independent switching, which should facilitate a shorter and faster transition period. The fact that a CLEC might choose at some point in the future, for some unidentified reason, to retire a switch, cannot change the fundamental nature of that market as one in which CLECs already had determined to invest switching resources.

As a final note, the Commission should reject the UNE-P proponents' argument that it is necessary to look at areas smaller than a LATA for purposes of establishing a transition plan or performing an impairment analysis. In particular, it would be arbitrary and capricious for the Commission to use zones established by states to set UNE rates for these purposes. Because states have broad discretion in establishing zones, there is a dramatic lack of uniformity in the number of zones in a state or the method used to assign wire centers (or portions of wire centers)

to particular zones.[19] Due to these variations, the number of wire centers assigned to a particular zone will vary widely from state to state.[20] Accordingly, tying a transition plan or impairment analysis to UNE zones would undoubtedly lead to inconsistent results and should not be given further consideration.

The UNE-P proponents fail to undermine Qwest's proposed transition or its underlying premise that the unbundled switching requirement should be eliminated on a national basis. Qwest's proposal presents a sensible means of balancing the Commission's various objectives in this proceeding and therefore should be adopted.

Sincerely yours,

/s/ R. Steven Davis

cc: Kathleen Q. Abernathy
Michael J. Copps
Kevin J. Martin
Jonathan S. Adelstein
Christopher Libertelli
Matthew Brill
Daniel Gonzalez
Lisa Zaina
Jordan Goldstein
William Maher
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[19] Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, Secretary, FCC, at 3-4 (Oct. 30, 2002). In Qwest's region, most states have between three and five zones, but another has considered establishing up to 166 zones within the state. *Id.* at 3. Some states assign wire centers to particular zones based on the Metropolitan Statistical Area in which the wire centers are located; other states on the basis of the average cost of serving customers in the wire center; while still other states assign portions of wire centers to particular zones based on the distance to a wire center switch. *Id.*

[20] For example, in Minnesota (which includes Minneapolis), only one wire center has been assigned to Zone 1, 14 to Zone 2, 14 to Zone 3, and 129 to Zone 4. In contrast, Oregon has 40 wire centers in Zone 1, 26 in Zone 2, and 11 in Zone 3. *Id.* at 4.